IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 97.

UNITED STATES OF AMERICA, Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF FOR THE UNION PACIFIC RAILROAD COMPANY.

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MISCELLANEOUS

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Opinions Below.

The opinion of the Court of Appeals [R. 18-24] is reported at 230 F. 2d 690. The opinion of the District Court [R. 7-11] is reported at 126 F. Supp. 646.

Jurisdiction.

The judgment of the Court of Appeals [R. 24] was entered on February 24, 1956. The petition for a writ of certiorari was filed on May 21, 1956, and was granted on October 8, 1956 [R. 24; 352 U. S. 818]. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented.

Was the court below correct in holding that the Act of July 1, 1862, 12 Stat. 489, granting Union Pacific "the right of way through the public lands . . . for the construction of said railroad and telegraph line," conveyed a limited fee which entitles the railroad to develop and take the minerals within the right of way?

Statute Involved.

The pertinent portions of the Act of July 1, 1862, 12 Stat. 489, and of the Act of July 2, 1864, 13 Stat. 356, are set forth in an appendix to this brief.

Statement.

The material facts are not in dispute. Petitioner's statement adequately frames the legal issue before the Court in this case.

The District Court entered judgment for Union Pacific on January 14, 1955 [R. 14]. The court held that by the Act of July 1, 1862, the United States granted to Union Pacific a limited fee in the lands comprising the right of way by which the company acquired the "sole right" to the subsurface oil, gas, and other minerals [R. 13-14]. The court found as a fact that Union Pacific's proposed development of the minerals would "in no way interfere with the use of the right of way for railroad and telegraph purposes" [R. 13], and concluded that Union Pacific may engage in such operations "so long as they do not interfere with the primary purpose of the grant" [R. 14].

The Court of Appeals for the Tenth Circuit unanimously affirmed on February 24, 1956 [R. 24]. In up-

holding Union Pacific's right to take the minerals within the right of way, the court relied on a long line of Supreme Court decisions which held that "considering the time and the circumstances under which these grants were made, Congress intended to convey a limited fee" [R. 19]. The court found that "The governmental policy in effect at the time of the Union Pacific grant, was that a grant or conveyance by the United States carried with it the full title, including minerals" [R. 23]. The court rejected the United States' assertion that it was the federal policy prior to 1871 to reserve mineral rights in public land grants and held that such a policy was not fully developed until 1916 [R. 23-24].

Summary of Argument.

I.

The history of railroad land grants makes it clear that the right of way granted to Union Pacific by the 1862 Act was "the land itself" and not a mere "right of passage" or "easement." This history, which was summarized and relied upon in *Great Northern Ry. Co. v. United States*, 315 U. S. 262, shows that the year 1871 marks the end of an era in congressional policy with respect to grants for the construction of railroads. Prior to 1871 Congress made extensive outright grants of alternate sections ("place lands") adjacent to the rights of way to encourage the construction of transcontinental railroads, and the rights of way granted during that period, including the Union Pacific right of way, were "limited fees" in the land itself. That this was the nature of the pre-1871 rights of way was pointed out by the Court in *Great Northern*, 315 U. S. at 273 n. 6, and candidly recog-

nized by the Government in its brief in *Great Northern* (p. 16). However, after the sharp change in congressional policy in 1871, outright grants of "place lands" along the rights of way were discontinued and the rights of way granted after that date were, as the Court held in *Great Northern*, only rights of passage or easements.

The provisions of the 1862 Act reflect the fact that it was the product of a different era from the post-1871 legislation and that it conveyed a limited fee in the lands comprising the right of way. Section 2 provides that the grant is for a stated purpose (the construction of a railroad and telegraph line), and such a grant ordinarily conveys a fee, not a lesser estate. The provision of Section 6 that the grant is "on condition" that the railroad must be kept in repair and use shows that the fee was limited or defeasible in nature. The fact that the Act granted a "limited fee" in the land is borne out by the provision of Section 2 requiring the United States to extinguish Indian titles to the right of way lands. Moreover, the granting language in Section 2 is closely similar to that in Section 3 granting "place lands" which concededly were granted in fee. The nature of the Union Pacific grant is also illumined by the fact that in the 1862 Act, there is no counterpart of provisions of the 1875 Act upon which the Court relied in holding the right of way involved in *Great Northern* to be an easement.

A long line of decisions of this Court hold that the pre-1871 right of way grants conveyed a limited fee. *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 271, the leading case in this series, emphasizes that under an 1864 Act closely similar to the Union Pacific Act, the Northern Pacific right of way was granted "just as

though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way." As early as 1880 the Court held in *Railroad Company v. Baldwin,* 103 U. S. 426, 429, that a right of way granted in 1866 was "a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed."

It is well settled that a holder of a limited or defeasible fee has, so long as the estate continues, the same rights as an owner in fee simple absolute to take the minerals. Both under federal and state law, this rule is uniformly recognized, and the law of Wyoming, where the right of way involved here is located, is in accord. No canon of construction overcomes this settled principle of law under which Union Pacific is entitled to take the minerals within the right of way.

The terms of the grant in this case make it clear that the right of way may be used for any purpose which does not interfere with railroad operations. The grant is not limited to uses "necessary" for the construction of the railroad, as was the case in *Caldwell v. United States,* 250 U. S. 14, which is relied upon by petitioner. The use of portions of railroad rights of way for non-railroad purposes which do not interfere with railroad operations is widespread, and the courts have regularly approved it. The trial court found, and petitioner does not challenge, that Union Pacific's proposed oil operations will in no way interfere with the use of the right of way for railroad and telegraph purposes.

II.

A congressional policy of reserving the mineral rights from federal land grants which petitioner seeks to apply to the 1862 right of way grant was in fact not adopted until after the beginning of the twentieth century. Examination of congressional action and official statements subsequent to 1900 establishes beyond doubt that the separation of the mineral rights from the surface was a "new concept" which was first employed in 1909. Petitioner's argument with respect to mineral policy amounts to an unwarranted attempt to distort an alleged policy of excepting mineral lands into the entirely different policy of reserving mineral rights.

The federal mineral policy actually operative in 1862 supports Union Pacific's right to the minerals. The objective of the Federal Government at that time was to encourage the rapid development of mineral resources. To accomplish this Congress made mineral lands freely available at nominal prices. The policy of segregating mineral lands from agricultural lands in the grants of "place lands" to railroads was for the purpose of keeping such lands open for rapid mineral development. Thus the policy which was in effect in 1862 shows that Congress had no intention of locking up and reserving for the United States the minerals within the right of way. On the contrary, since Union Pacific was entitled to exclusive use and possession of its right of way, the best way to implement the federal policy of encouraging mineral development was to grant the railroad a limited fee in its

right of way, including the right to take the minerals. Union Pacific's position is buttressed by *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, which indicates that when the title to the right of way passed to the company, upon construction of the railroad, there could be no reservation of minerals in the United States.

The legislative history of the 1862 Act also shows that there is no basis for implying a reservation of mineral rights in the right of way grant. Although a reservation of mineral rights in the "place land" grant was proposed by Representative Cradlebaugh, it was rejected because mineral lands were already excepted from the place land grant and because a reservation of mineral rights in the lands granted would have involved a radical change in the policy of the Government in effect at that time. Decisions of this Court and the provisions of the Act make it clear that the exception of mineral lands in Section 3 of the Act applies only to the place land grant and does not apply to the right of way. Petitioner recognizes that this exception of mineral lands could not be applied to the right of way which had to follow a reasonably straight line and could not jump over and go around mineral lands.

Neither the administrative nor the legislative construction of the 1862 Act affords any basis for holding that the mineral rights within the right of way did not pass to the railroad.

ARGUMENT.

I.

Union Pacific Is Entitled to Take the Minerals in the Right of Way Lands Granted by Section 2 of the Act of July 1, 1862.

A. The 1862 Act Conveyed a Limited Fee in the Lands Comprising the Right of Way.

Congress, by Section 2 of the Act of July 1, 1862, 12 Stat. 489, provided that a "right of way through the public lands be, and the same is hereby, granted to said company [Union Pacific's predecessor] for the construction of said railroad and telegraph line." In *New Mexico v. United States Trust Co.*, 172 U. S. 171, 182, this Court explained that the phrase "right of way" may be used to describe either (1) a "right of passage" amounting to an "ordinary easement," or (2) "the land itself."* The two ways in which the phrase may be used are also clearly stated in *Joy v. St. Louis*, 138 U. S. 1, 44, as follows:

> "Now, the term 'right of way' has a twofold signification. It sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed."

The right of way granted to Union Pacific by the Act of July 1, 1862, was "the land itself.". This is made clear

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*The *New Mexico* case, which is discussed pages 23-25, *infra*, holds that the 1866 right of way grant to the Atlantic and Pacific R. Co., which is similar to the Union Pacific grant, conveyed a fee in the land itself, not a mere right of passage.

by (1) the history of railroad grants in the nineteenth century, (2) the provisions of the 1862 Act, and (3) prior decisions of this Court.

1. The History of the Nineteenth Century Railroad Grants Indicates That the 1862 Act Granted Union Pacific a Limited Fee in the Right of Way Lands.

The following concise and candid statement of the history of railroad land grants is quoted from the brief for the United States (pp. 15-16) in *Great Northern Ry. Co. v. United States*, 315 U. S. 262, in which the Court held that rights of way granted under the 1875 General Right of Way Act, 18 Stat. 482, are easements:

> "The year 1871 marks the end of one era and the beginning of a new in American land-grant history. In that year the policy of lavish grants of land to encourage railroad construction was replaced by a new policy of severe restriction of federal munificence in respect of railroads. It is in the light of this shift that the Act of 1875 must be read, for it is well recognized that railroad grants 'are to receive such a construction as will carry out the intent of Congress,' and to ascertain that intent courts 'must look to the condition of the country when the acts were passed.' *Winona & St. Peter R. R. Co. v. Barney*, 113 U. S. 618, 625; *United States v. Denver &c. Railway*, 150 U. S. 1, 14; *Minidoka & S. W. R. Co. v. Weymouth*, 19 Idaho 234 (1911). 'Courts, in construing a statute, may with propriety recur to the history of the times when it was passed.' *United States v. Union Pacific R. R. Co.*, 91 U. S. 72, 79; *Smith v. Townsend*, 148 U. S. 490, 494.
>
> "That there was a marked change in land-grant policy in 1871 is not open to dispute. The first important grant of public lands for railroad pur-

poses was made to the Illinois Central in 1850.* During the next two decades 'there passed into the hands of western railroad promoters and builders a total of 158,293,000 acres, an area equalling that of the New England states, New York, and Pennsylvania combined.'** The largest of these grants (40,000,000 acres) was made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365. That Act, in addition to providing a 400-foot right of way from Lake Superior to Puget Sound, also granted the alternate odd-numbered sections of public lands for 40 miles on each side of the railroad, with indemnity provisions for lands already sold, homesteaded, pre-empted, or otherwise disposed of. It is thus apparent that Congress in 1864 was willing to grant lands in 'almost any amount'*** to encourage the construction of transcontinental railroads. Faced with such an open-handed congressional policy, the courts have construed such early grants as conveying to the railroads a fee in their rights of way."****

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*"Act of September 20, 1850, c. 61, 9 Stat. 466."

**" 'Land Grants,' 9 Encyclopaedia of the Social Sciences (1933), p. 35."

***"Statement by Representative Thaddeus Stevens during the debates on the Northern Pacific Bill, Cong. Globe, 38th Cong., 1st sess., 1698 (1864)."

****"*Northern Pacific Ry. v. Townsend*, 190 U. S. 267, 271."

The foregoing historical material, and especially the change in policy in 1871, was extensively relied upon in the *Great Northern* decision. The Court stated that "Beginning in 1850, Congress embarked on a policy of subsidizing railroad construction by lavish grants from the

public domain," but that "After 1871 outright grants of public lands to private railroad companies seem to have been discontinued." 315 U. S. at 273-274. The Court held that the Right of Way Act of 1875 was "a product of the sharp change in Congressional policy with respect to railroad grants" and therefore that it was "improbable that Congress intended by it to grant more than a right of passage." 315 U. S. at 275.

The Court noted that the 1862 Union Pacific grant was "typical" of the pre-1871 grants. 315 U. S. at 273, n. 6. The rights of way conveyed in such acts, the Court said, "have been held to be limited fees." *Ibid.* The Court reasoned that since in the pre-1871 period "Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same Act."* 315 U. S. at 278. The Court referred to cases holding that the pre-1871 right of way grants were limited fees, but said that they were inapplicable to the 1875 Act because they "deal with rights of way conveyed by land-grant acts before the shift in congressional policy occurred in 1871." *Ibid.*

Brief reference to the circumstances which impelled enactment of the Union Pacific Act in 1862 provides persuasive evidence that the right of way granted therein should not be lumped together with those granted after

*In concrete terms, since Congress granted in fee to Union Pacific alternate sections ("place lands") adjacent to the right of way amounting to 12,800 acres per mile of railroad, there is little reason to suppose that Congress would in the same Act decline to grant in fee the right of way which contains only some 50 acres per mile.

1871. Indeed, this Court in *United States v. Union Pacific R. Co.*, 91 U. S. 72, 79, emphasized that,

> "Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed."

There is no better picture of those circumstances than that sketched by the Court in that case as follows:*

> ". . . The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. . . . . It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provisions for the future. This could be done in no better way than by the construction of a railroad across the continent. . . .
>
> ". . . Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely in-

*The background of the Union Pacific Acts was also well summarized less than a year ago in *Thomas v. Union Pacific R. Co.*, 139 F. Supp. 588, 591-592 (D. Colo. 1956), aff'd, ... F. 2d ..... (10th Cir., Dec. 24, 1956).

creased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable." 91 U. S. at 79-80.

In contrast to the 1875 Act, the 1862 Act was in effect a proposal addressed by the Government to the prospective investors named therein and to others who, it was hoped, could be induced to join in the hazardous enterprise of constructing a railroad to the Pacific Ocean. *Cf. United States v. Northern Pacific Ry. Co.*, 256 U. S. 51, 63-64. Congress was not only willing but anxious to provide whatever was necessary by way of inducement. It is this background which has caused the Court to emphasize that the grants made by the 1862 Act, including the right of way, are not to be regarded as "bestowing bounty on the railroad" or as a "gratuitous reward" but rather as something earned by compliance with the Act. *Nadeau v. Union Pacific R. Co.*, 253 U. S. 442, 444; see *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, 679-680.

The historical background and the change in policy in 1871 are as decisive here as they were in *Great Northern*. Just as the developments after 1871 led the Court to hold that the 1875 Act granted only an easement, so the pre-1871 circumstances show that the 1862 grant to Union Pacific conveyed a limited fee in the lands comprising the right of way.

2. The 1862 Act, and Its Contrast With the 1875 Act, Show That a Limited Fee in the Land Itself Was Granted to Union Pacific.

The provisions of the 1862 Act reflect the fact that it was the product of a different era from the post-1871 Acts. Section 2 of the 1862 Union Pacific Act provides that "the right of way . . . is . . . granted . . . for the construction of said railroad and telegraph line." It is hornbook law that a "grant" for a stated purpose ordinarily conveys a fee simple, not a lesser estate. Am. Jur., Estates, §71; C. J. S., Estates, §10. This principle was applied in *Wright v. Morgan*, 191 U. S. 55, where the Court held that an Act granting the City of Denver certain lands "for a cemetery" conveyed a "fee simple absolute." Mr. Justice Holmes, for the Court, emphasized that the statement of purpose "did not restrict the ordinary incidents of title." 191 U. S. at 58.

The statement of purpose in Section 2 of the Union Pacific Act is supplemented by the provision in Section 6 to the effect that the grant is made "upon condition" that the company "shall keep said railroad and telegraph line in repair and use." Such words of condition are commonly used in the creation of a limited or defeasible fee in land. Restatement, Property, §45; Simes and Smith, The Law of Future Interests, §§247, 286 (2d ed. 1956). The effect of the grant and the condition is "just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way." *Cf. Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 271. There is no similar condition in the 1875 Act under which the right of way was held to be an easement in *Great Northern*.

Section 2 of the Union Pacific Act provides that "The United States shall extinguish as rapidly as may be the

Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made." A typical example of the operation of such a provision may be seen in *Clairmont v. United States*, 225 U. S. 551, 555-556, where the Flathead Indians by agreement relinquished to the United States all the "right, title, and interest" in a portion of the Northern Pacific right of way.* The existence of this provision in the 1862 Act and the absence of a similar provision in the 1875 Act indicate that in the earlier Act, it was the purpose of Congress to extinguish other claims and grant the railroad the entire interest in the lands comprising the right of way so long as railroad operations continue.

Equally significant are provisions of the 1875 Act which have no counterpart in the 1862 grant to Union Pacific. The Court in *Great Northern* found especially persuasive the fact that Section 4 of the 1875 Act requires the location of each right of way to be noted on the plats in the local land office and provides that "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." 315 U. S. at 271. The Court reasoned that the provision for disposal of the land subject to the right of way is wholly inconsistent with the right of way being deemed a limited fee. The absence of a comparable provision in the 1862 Act serves to "illumine the nature of the right of way granted," just as its presence did in *Great Northern*, 315 U. S. at 272.

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*In the *Clairmont* case, discussed at p. 25, *infra*, the Court held that under the 1864 Northern Pacific right of way grant, 13 Stat. 365, the "railroad company obtained the fee in the land constituting the 'right of way.'"

In *Great Northern* the Court further relied upon the fact that Section 2 of the 1875 Act declares that any railroad whose right of way passes through a canyon, pass, or defile "shall not prevent any other railroad company from the *use and occupancy* of said canyon, pass, or defile, for the purposes of its road, *in common* with the road first located."* 315 U. S. at 271. Once again, the 1862 Union Pacific grant contains no such provision.

Likewise relevant is the fact that the granting language of Section 2 of the 1862 Act is closely similar to that of Section 3 of that Act which provides:

> "And be it further enacted, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, . . ."

There is no doubt but that Section 3 granted a fee in the land itself (see *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, 710) and petitioner recognizes this fact (Br. p. 27).** It follows that the right of way granted was the land itself, not a mere easement.

Petitioner attempts to distinguish the Section 3 grant from that made in Section 2 by arguing that the purpose of Section 3 was to provide "financial aid" while the purpose of Section 2 was only to provide a "physical situs for the location of the tracks and necessary appurtenances" (Br. pp. 14-16). There is no basis, however, for the

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*The emphasis in this quotation appears in the Court's opinion.

**The effect of the exception of mineral lands from the lands granted by Section 3 is discussed at pp. 58-60, *infra*.

petitioner's arbitrary assumption that the purpose of Section 2 was limited to providing a right of passage. On the contrary, this Court has itself emphasized that "the right of way for the whole distance of the proposed route was a very important part of the aid given." *Railroad Company v. Baldwin*, 103 U. S. 426, 430. That Section 2 has this broader purpose was reiterated with respect to the very right of way involved here in *Union Pacific R. Co. v. Laramie Stock Yards*, 231 U. S. 190, 198.

Petitioner also suggests, in the light of hindsight, that Congress "erred in too lavishly dispensing non-mineral 'place lands,' or in overestimating the amount of subsidy needed to construct the road," and petitioner claims that the error would be "compounded" by affirmance of the Court below (Br. p. 44). Even if petitioner were right in its allegation of lavishness, "No argument can be drawn from the wisdom that comes after the fact." *United States v. Union Pacific R. Co.*, 91 U. S. at 81. But certain it is that the consideration did not seem overgenerous at the time of the grant. On the contrary, it was not generous enough to induce investors to venture their money in such a hazardous enterprise. And so, after two years of unsuccessful efforts to raise the required funds, the railroad was offered increased aid by Section 4 of the amendatory Act of July 2, 1864, 13 Stat. 356.* Petitioner's argument that the consideration was too lavish was effectively answered nearly three-quarters

*Petitioner states (Br. p. 5) that the 1864 amendments do not affect the question here presented, but this amendment, which doubled the number of alternate sections granted in aid of construction, shows vividly the extent to which Congress was willing to go in offering inducement to obtain construction of a railroad to the Pacific Coast.

of a century ago in the Report for the year 1883 of the Government Directors of the Union Pacific Railway Company (the predecessor of the present company):

> "In discussing the magnificence of this gift from the Government as if there were no consideration for it, and the men who obtained it had in some way gained an unfair advantage, the conditions existing at the time it was made are lost sight of, and the circumstances attending it too often forgotten. . . . It should be remembered . . . that the condition upon which it was made, to wit, the building of the Pacific Railroad, was generally believed to be so improbable of fulfillment as practically to make it void and of no effect. The projectors of the road were at that time objects rather of sympathy as the victims of visionary speculations than of envy on account of their advantageous bargain." House Ex. Doc. No. 83, 48th Cong., 1st Sess., p. 17.

3. Decisions of This Court Establish That the 1862 Right of Way Grant Is a Limited Fee.

The rule that the pre-1871 right of way grants conveyed a limited fee is established in a long line of decisions of this Court which have discussed the nature of such grants. These decisions have decisive importance in resolving the question presented here because the legal terms they use to define the nature of the railroad's interest are words of art which have a definite and well-established meaning. The Court's statement in *Morissette v. United States*, 342 U. S. 246, 263, though made with reference to an Act of Congress, is even more pertinent as applied to decisions of this Court:

> ". . . And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows

and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. . . ."

Perhaps the leading case establishing the nature of the railroad's interest in the rights of way granted prior to 1871 is *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267. This case involved a portion of the right of way granted to the Northern Pacific under the Act of July 2, 1864, 13 Stat. 365, an act practically identical to the Union Pacific Act of 1862. The basic issue in this case was whether "an asserted title by adverse possession can be made efficacious" with respect to the right of way. 190 U. S. at 270. The answer to this question was held to depend on the nature and effect of the Act of Congress granting the right of way. On this point the Court first held that Congress granted a fee in the lands comprising the right of way:

> "Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered, *New Mexico v. United States Trust Co.*, 172 U. S. 171, 181; *St. Joseph & Denver City R. R. Co. v. Baldwin*, 103 U. S. 426, it must be held that the fee passed by the grant made in Section 2 of the act of July 2, 1864." 190 U. S. at 271.

The Court went on to define specifically the implied condition of reverter which may limit the duration of the grant and which thus causes the fee to be limited or defeasible:

> ". . . But, although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the *Bald-*

> *win* case) 'to those necessarily implied, such as that the road shall be . . . used for the purposes designed.' . . . The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. *In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."** 190 U. S. at 271.

Petitioner attempts to discount the *Townsend* case by claiming that "it was hardly necessary to reach the question of the precise nature of the railroad's interest in the right of way" in that decision (Br. p. 34). The Court, however, thought otherwise. After defining the interest of the railroad as indicated in the passages quoted above, the Court placed its decision squarely on the "nature of the title" to the right of way. 190 U. S. at 271.**

In describing the railroad's interest in the lands comprising the right of way as a "limited fee," the Court in *Townsend* was correctly using a term which has a settled meaning in real property law. The term "limited fee" (and its synonyms, a "defeasible" or "qualified" fee) is traditionally used to refer to an estate in fee simple which will continue until the occurrence of a stated event, at which time the estate may revert to the grantor. Kent's

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*Emphasis in quotations throughout this brief is added, unless otherwise noted.

**Petitioner's suggestion that *Townsend* supports its argument that the right of way can be used only for railroad purposes is discussed at pp. 37-38, *infra*.

Commentaries, Vol. 4, p. 10 (Holmes ed., 1873);* Blackstone's Commentaries, Vol. 2, pp. 109-110 (9th ed. 1783); Restatement, Property, Sec. 23, p. 57.** Under this long-established definition, the fee is limited only as to duration. It is a fee simple so long as the estate continues in existence. But it is a limited or defeasible fee because there is the possibility that the estate may come to an end at some future time.***

Even earlier the Court had authoritatively determined the nature of the pre-1871 right of way grants in the *Baldwin, Roberts* and *New Mexico* cases. *Railroad Company v. Baldwin,* 103 U. S. 426, involved the Act of July 23, 1866, 14 Stat. 210, granting a right of way for the St. Joseph & Denver City Railroad. This grant was similar in all important respects to the Union Pacific right of way grant of 1862. Baldwin claimed a portion of the St. Joseph & Denver City right of way under a location made after the date of the grant but before the definite location of the road. The Court rejected Bald-

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*As an example of the kind of an act or event which would cause the estate to terminate, Kent cites the case of "a limitation to a man . . . so long as St. Paul's church shall stand, . . ." Kent then adds the following comment: ". . . It is the uncertainty of the event, and the possibility that the fee may last forever, that renders the estate a fee, . . ." (p. 10).

**The Restatement of Property (Sec. 23, Illus. 4, p. 57) gives the following illustration: "A, owning Blackacre in fee simple absolute, transfers Blackacre 'to the Town of B and its successors and assigns to be held by it and them so long as the said Blackacre is used for public school purposes.' Town B has an estate in fee simple determinable. A has a possibility of reverter." In the terminology of the Restatement, a fee simple determinable is a type of fee simple defeasible (see §44).

***Whether upon cessation of railroad operations the reversion is automatic or requires affirmative action need not be considered, because the rights of the grantee prior to the reversion are the same in either case. Restatement, Property, §193.

win's claim, holding that the railroad grant was *in praesenti* and that as soon as the route was definitely fixed, the title attached as of the date of the original Act. As to the nature of the right of way grant, the Court held:

> ". . . It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. . . ." 103 U. S. at 429-430.

Petitioner attempts to minimize the significance of this case by stating that the "ruling might have rested" solely on the fact that "If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road" (Br. pp. 36-37). It is, however, too late to rewrite the opinion, and the fact is that the Court based its holding on the nature of the right of way grant, as indicated in the quotation above.

Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U. S. 114, involved a grant made in 1866, 14 Stat. 289, to the Union Pacific Railway Company, Southern Branch, the name of the grantee being later changed to Missouri, Kansas & Texas Ry. Co. A basic problem in the case was whether the grant of the right of way conveyed lands wholly within an Indian Reservation. The Court concluded that the fee to the land within the Indian Reservation had always been in the United States, subject only to the Indian right of occupancy, and that therefore the United States could and did grant the right of way "to the company unconditionally." 152 U. S. at 116. Since the right of way grant under consideration was similar

in all important respects to the 1862 grant to Union Pacific, the following quotations are especially significant:

> "The United States had the right to authorize the construction of the road of the Missouri, Kansas and Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of the two hundred feet as a right of way to the company."
>
> ". . . That grant [*i. e.*, M. K. & T. right of way] was absolute in terms, covering both the fee and possession, ..."
>
> "The right and power of the government to dispose of the fee of the lands in controversy occupied by the Osage Indians, with their rights of occupancy, having been exercised, and a grant of both fee and possession having been made to the Missouri, Kansas and Texas Railway Company, ..." 152 U. S. at 116-118.

New Mexico v. United States Trust Co., 172 U. S. 171, involved the right of way granted to the Atlantic & Pacific R. Co. by the Act of July 27, 1866, 14 Stat. 292. This grant contained a provision exempting the railroad right of way from taxation within Territories. The then Territory of New Mexico claimed the right to tax the buildings and other improvements located on the right of way as personal property. In support of this claim it was urged that the right of way was granted only as an easement and that the improvements were not part of the realty. The Territory's power to tax turned on whether the Railroad Company owned its right of way in fee or as an easement.

The Court in the *New Mexico* case emphasized that whether the term "right of way" was used in the sense of

conveying a fee in the land itself or merely to signify a right of passage depended on the intention of Congress. Upon examining the statute the Court found that Congress intended to and did grant the fee in the land itself, not merely the abstract right of use. In support of this holding, the Court relied on *Missouri, Kansas & Texas Ry. Co. v. Roberts, supra:*

> ". . . So this court in *Missouri, Kansas & Texas Railway v. Roberts,* 152 U. S. 114, passing on a grant to one of the branches of the Union Pacific Railway Company of a right of way two hundred feet wide, decided that it conveyed the fee." 172 U. S. at 182.

New Mexico had sought to escape the force of the *Roberts* case by contending that "the distinction between an easement and the fee was not raised" in the argument in that case. But the Court rejected this contention, holding as follows:

> ". . . The difference between an easement and the fee would not have escaped his [Mr. Justice Field's] attention and that of the whole court, with the inevitable result of committing it to the consequences which might depend upon such difference." *(Ibid.)*

The reference in the quotation to "the consequences which might depend upon such difference" emphasizes that the Court in the "limited fee" cases did not use the terms "fee" and "easement" carelessly and loosely. In *New Mexico* an exemption from taxation was the consequence of the holding that the right of way was granted in fee rather than as an easement; so also is it a consequence of that holding that the grantee is entitled to take the minerals.

Petitioner tries to brush the *New Mexico* case aside by arguing that it is "questionable" whether the Court was required "to reach the question of the railroad's interest" and by stating that "it could well have been held that such improvements were in contemplation when the granting Act was passed, regardless of what the interest of the company might be" (Br. p. 35). The short answer to this argument is that the Court did reach the question of the nature of the railroad's interest and did hold that it was a fee in the land itself. Petitioner only underscores the importance of the actual holding by claiming that the decision "could well have been" placed upon some other ground.

Another decision of this Court defining the nature of the railroad's interest is *Clairmont v. United States*, 225 U. S. 551. In that case the defendant was charged with the criminal offense of introducing liquor into Indian country. The alleged offense had been committed while the defendant was traveling with liquor in his possession on a train at a point where the Northern Pacific right of way which had been granted by the Act of July 2, 1864, 13 Stat. 365, passed through an Indian Reservation. In holding that the right of way was not "Indian country" and therefore that the indictment must be quashed, Mr. Justice Hughes for the Court stated that:

> ". . . by the grant of Congress the railroad company obtained the fee in the land constituting the 'right of way' . . ." 225 U. S. at 556.

While of course this case does not specifically hold that the railroad owns the minerals contained in the right of way, that conclusion is the legal consequence of the Court's statement that the railroad obtained the "fee in the land" comprising the right of way.

Likewise significant is *Missouri, Kansas & Texas Ry. Co. v. Oklahoma*, 271 U. S. 303, where the railroad and the City of McAlester had agreed that openings and crossings under the railroad were to be constructed at the sole expense of the city. The state Corporation Commission ignored the agreement and ordered the railroad to construct crossings and pay half the cost. The railroad had been built on the right of way granted by Congress under the Act of July 26, 1866, 14 Stat. 289, the same Act considered in the *Roberts* case. In upholding the agreement and setting aside the order of the state Commission, the Court relied upon the nature of the Company's interest in its right of way:

> ". . . The company owned its right of way lands and station grounds in fee. . . . It was entitled to compensation for any of its property that might be taken or damaged by the construction and use of the crossings." 271 U. S. at 308.

Petitioner's comment (Br. p. 38) that there was "no real construction of the grant" is based upon the untenable assumption that the Court used the historic word of art, "fee," carelessly and without regard for its consequences.

In addition to the foregoing cases referring to 1864 and 1866 rights of way which are similar to the 1862 Union Pacific grant, there are two cases which specifically involve Union Pacific's title to its right of way. In *Union Pacific R. Co. v. Snow*, 231 U. S. 204 and *Union Pacific R. Co. v. Sides*, 231 U. S. 213, this Court reinstated trial court judgments which decreed that under its 1862 grant, Union Pacific is "the owner in fee and entitled to the possession of each and every part" of its right of way. The trial court judgments, while not set forth in this Court's opinion, were contained in the records on appeal and were

thus before the Court.* The importance of these decrees cannot be minimized by asserting that the exact nature of the railroad's interest was not in issue, for, as we have pointed out, a similar argument was explicitly rejected by this Court in *New Mexico v. United States Trust Co.*, 172 U. S. at 182.

Petitioner seeks to explain away the foregoing line of cases by claiming that the rights asserted, "if sustained, would have impaired the use of the right of way for railway purposes." (Br. pp. 9, 40.) The facts do not support this alleged distinction. In three of the foregoing limited fee cases, no claim was made which would in any way have "impaired the use of the right of way for railway purposes." *M. K. & T. Ry. v. Oklahoma*, 271 U. S. 303; *New Mexico v. United States Trust Co.*, 172 U. S. 171; *Clairmont v. United States*, 225 U. S. 551.

The decisions of this Court establishing the limited fee principle were reviewed and applied in *United States v. Illinois Central R. Co.*, 89 F. Supp. 17 (E. D. Ill. 1949), aff'd, 187 F. 2d 374 (7th Cir. 1951), where it was held that the railroad was entitled to take the minerals within its right of way. In that case, Congress made the original grant in 1850 to the State of Illinois for the purpose of aiding in the construction of a railroad, and the State of Illinois was authorized to grant and did grant the right of way and adjacent sections to Illinois Central for that purpose. The language of the Congressional grant to Illinois is almost identical with the grant of the right of way to Union Pacific. After carefully analyzing the

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*Transcript of Record, p. 16, *Union Pacific R. Co. v. Snow*, 231 U. S. 204; Transcript of Record, p. 16, *Union Pacific R. Co. v. Sides*, 231 U. S. 213.

precedents, the District Court held that Illinois Central has a limited fee in its right of way:

> "In the same opinion [the *Great Northern* opinion] the court distinguishes between the periods in the legislative and economic history of the United States from 1850 to 1871 and the period following 1871 in relation to the grants of lands from public domain to encourage the building of railroads and the Congressional attitude toward such grants. It points out that the period beginning in 1850 was characterized by a Congressional policy of subsidizing railroad construction by lavish grants from the public domain of which the Illinois Central Grant here in question, *together with the Union Pacific Grant of July 1, 1862,* Chap. 120, 12 Stat. at L. 489; the Amended Union Pacific Grant, Act of July 2, 1864, Chap. 216, 13 Stat. at L. 356; and the Northern Pacific Grant, Act of July 2, 1864, Chap. 217, 13 Stat. at L. 365, are referred to as being typical of the period. . . ."
>
> "Applicable to the period to which the Illinois Central Grant belongs is the case of *Northern Pacific Railway Company v. Townsend,* 190 U. S. 267, . . ."
>
> "On the authority of the *Northern Pacific* case it must be held that the defendant by its deed from the State of Illinois given pursuant to said grant in the Act of 1850, received and holds a limited fee in its right of way subject to an implied condition of reverter in the event it ceases to use or retain the right of way for the purpose for which it was granted." 89 F. Supp. at 21-23.

On appeal the Court of Appeals for the Seventh Circuit affirmed this decision and adopted the opinion of the District Court. 187 F. 2d 374 (1951). The United

States did not seek certiorari. Thus, the *Illinois Central* case stands as the latest in a uniform line of decisions which establish that rights of way such as that granted to Union Pacific are limited fees.

B. As Holder of a Limited Fee in the Right of Way Lands, Union Pacific Is Entitled to Take the Minerals.

In the foregoing section, we have shown that the 1862 Act granted Union Pacific a limited fee in the lands comprising its right of way which will continue as long as railroad operations are maintained. In this section, we consider whether the holder of such an interest under the 1862 Act has a right to take and develop the minerals contained in the right of way.

1. The Holder of a Limited Fee Has the Same Rights as an Owner in Fee Simple.

It is well-settled that the owner of a limited, defeasible or qualified fee has, so long as the estate continues, the same rights as an owner in fee simple absolute to take the minerals.* This proposition is expressed in Kent's Commentaries, Vol. 4, p. 11 (Holmes ed. 1873), as follows:

> ". . . the proprietor of a qualified fee has the same rights and privileges over the estate as if he were a tenant in fee simple; . . ."

*The elementary principle that a holder of a fee simple is entitled to take the subsurface minerals is stated in 1 Tiffany, Real Property, §33, p. 47 (3d ed.); see also *Del Monte Mining and Milling Co. v. Last Chance Mining and Milling Co.*, 171 U. S. 55, 60.

And again in Am. Jur., Estates, §30, p. 490:

> "The proprietor of a determinable, qualified, or base fee has the same rights and privileges over his estate, until the qualification on which it is limited is at an end, as if he were a tenant in fee simple."

Other texts and digests announce the same rule. 1 Tiffany, Real Property, §220, p. 387 (3d ed.); C. J. S., Estates §10, pp. 23-24. It is summed up in the Restatement of Property, Section 193, Comment "h," p. 799, as follows:

> "Thus the owner of an estate in fee simple defeasible or in fee simple conditional normally is not restricted in cutting timber for sale, in opening mines, *in drilling for oil,* or in removing or altering buildings."

A leading case for this proposition is *Davis v. Skipper,* 125 Tex. 364, 83 S. W. 2d 318 (1935), where the plaintiffs, who held a possibility of reverter in lands which their predecessors had granted for church purposes, were not permitted to enjoin the church from drilling. The Court said:

> "So long as there is no abandonment of the land for church purposes, the trustees of the church have therein what has been termed a 'base, qualified or determinable fee.' Such an estate is a fee, because by possibility it may endure forever; but 'as it depends upon the concurrence of collateral circumstances which qualify and debase the purity of the donation, it is therefore a qualified or base fee.'. . . .
>
> "It follows, therefore, that the grantee under such a deed as is involved here may use the land to the extent of producing the oil and gas therefrom, and,

conversely, the holder of a mere possibility of reverter has no such estate as authorizes him to maintain an injunction to prevent such use of the land. *Williams v. McKenzie*, 203 Ky. 376, 262 S. W. 598; *Hillis v. Dils*, 53 Ind. App. 576, 100 N. E. 1047, 1049, 102 N. E. 140; *Gannon v. Peterson*, 193 Ill. 372, 62 N. E. 210, 55 L. R. A. 701; *Landers v. Landers*, 151 Ky. 206, 151 S. W. 386, Ann. Cas. 1915A, 223; *Dees v. Cheuvronts*, 240 Ill. 486, 88 N. E. 1011; *Hopper v. Barnes*, 113 Cal. 636, 45 P. 874, 875; *New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co.*, 44 N. J. Eq. 398, 15 A. 227, 1 L. R. A. 133.

"These cases, as well as others which could be cited, are so directly in point as to be decisive of the question. . . ." 83 S. W. 2d at 320.

A recent case illustrating the same rule is *Frensley v. White*, 208 Okla. 209, 254 P. 2d 982 (1953). The court held that a grant for "so long as said premises shall be held, kept and used by said church . . . for a place of divine worship" did not preclude the simultaneous use of the premises by the grantee for the production of oil and gas and for other purposes.

An important line of federal cases reflects the rule that the holder of a limited or defeasible fee has the same rights as an owner in fee simple until the happening of the event on which the estate is limited. In eminent domain cases, federal courts uniformly award the holder of a limited fee or comparable estate the full value of the property if the happening of the event on which the estate is limited is not imminent, and no award is made to the holder of the reversionary interest. *United States v. 1119.15 Acres*, 44 F. Supp. 449 (E. D. Ill., 1942); *United States v. 16 Acres*, 47 F. Supp. 603 (D. Mass., 1942); *People of Puerto Rico v. United States*, 132 F.

2d 220 (1st Cir., 1942). The award of full compensation to the holder of the present interest in these cases squarely negatives any suggestion that the right to take the minerals is vested in anyone else.

The principle that the holder of a limited fee can take the minerals was applied in the *Illinois Central* case. After concluding that the railroad holds a limited fee in its right of way, the court there considered "the incidents of a limited fee title" under Illinois law and held:

> "The rule in Illinois is to the effect that title to the minerals underlying the surface with the right to extract them pass with a base or conditional fee. *Dees v. Cheuvronts,* 240 Ill. 486, 487, 88 N. E. 1011; *Regular Predestinarian Baptist Church of Pleasant Grove v. Parker,* 373 Ill. 607, 27 N. E. 2d 522, 137 A. L. R. 635; *Carlsen v. Carter,* 377 Ill. 484, 36 N. E. 2d 740. It would seem, therefore that title to the minerals underlying the surface of the railroad right of way is in the defendant with the power to extract and use unless such extraction in some way impairs the efficacy of the grant or the use of the granted right of way for railroad purposes." 89 F. Supp. at 23.

The law of Illinois was deemed to be controlling in view of the maxim that "whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states . . ." 89 F. Supp. at 23; see *Packer v. Bird,* 137 U. S. 661, 669; *Northern Pacific Ry. Co. v. Townsend,* 190 U. S. at 270. However, since the United States argued that state law is inapplicable, the Court also considered the question from the standpoint of federal law and arrived at the same result:

> "Even though the contentions of plaintiff were accepted that State law can have no weight in deter-

> mining the rights of defendant under the limited fee granted by Congress there seems to be ample authority in the Northern Pacific case, supra, and in the history and background of the grant discussed in that case and in the Great Northern case, supra, to make it appear that it was the intent of Congress to withhold for the United States only the right of reversion required to insure as far as possible the perpetuation of the operation of the railroad, the construction of which the grant was to aid and make possible." 89 F. Supp. at 24.

This holding is directly applicable to the Union Pacific grant.*

Uniform judicial recognition that the holder of a limited fee can take the minerals leaves no room for petitioner's argument (Br. pp. 47-48) that the application of state law might produce results which would vary from state to state.** Whatever law is applied, the United States

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*Petitioner contends that the *Illinois Central* case is distinguishable because "the Act contained no express indication that Congress intended to withhold minerals" (Br. p. 47). It is true that in the Union Pacific grant, there was an exception of mineral lands from the "place lands" granted in aid of construction, whereas there was no such exception in the Illinois Central grant. However, as petitioner concedes (Br. pp. 26, 30n), the exception of mineral lands in the Union Pacific grant applied only to the alternate sections adjacent to the right of way and could not apply to the right of way itself. So far as the right of way is concerned the *Illinois Central* case is on all fours with the case at bar.

**The law in Wyoming, where the right of way involved here is located, is in accord with the uniform view. Although no Wyoming case squarely rules the question, the Wyoming Supreme Court in *Johnson Irrigation Company v. Ivory*, 46 Wyo. 221, 239, 24 P. 2d 1053, 1058 (1933), said:

> ". . . a grantee who takes a limited or qualified fee, liable to be defeated whenever he ceases to use the land for the purposes specified in the grant, may, while the estate continues, have the same rights and privileges as an owner in fee simple."

has only a reversionary interest and is not entitled to prevent Union Pacific from taking the minerals so long as the estate continues.

2. The Right of Way May Be Used for Any Purpose Which Does Not Interfere With Railroad Operations.

It is clear that operations for the development of minerals can be undertaken on the Union Pacific right of way without interfering with railroad operations. The trial court found as a fact that "Defendant's proposed drilling operations and the removal, use and disposal of subsurface oil and other minerals will in no way interfere with the use of the right of way for railroad and telegraph purposes" [R. 13]. This finding is not challenged by petitioner.

It has long been the practice of railroads to use or authorize others to use portions of their rights of way for non-railroad purposes which do not interfere with railroad operations, and the courts have regularly approved the practice. In *Northern Pacific R. Co. v. Smith*, 171 U. S. 260, 275-276, the Court noted that:

> ". . . the railroad company was in actual possession thereof by its tenants. The precise character of the business carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company; . . ."

The propriety of using portions of the right of way not presently needed for railroad operations for other purposes which do not interfere with railroad operations has also been recognized in *M. K. & T. Ry. Co. v. Oklahoma*, 271 U. S. 303 (underpass); *United States v. Illinois Central R. Co.*, 187 F. 2d 374 (7th Cir. 1951) (oil development);

Northern Pacific Ry. Co. v. North American Telegraph Co., 230 Fed. 347, 349-350 (8th Cir. 1915) (competing telegraph line); *Mize v. Rocky Mountain Telephone Company*, 38 Mont. 521, 100 Pac. 971, 974 (1909) (irrigation ditch on Northern Pacific right of way); *Johnson v. Union Pacific R. Co.*, 133 Neb. 243, 274 N. W. 581, 584 (1937) (retail lumber business). *Cf.* cases cited pp. 29-32, *supra*. In the *Johnson* case, the Court, referring specifically to the Union Pacific right of way, said:

> "Both the supreme court of the United States and the interstate commerce commission have adopted the general rule that a railroad right of way adjacent to tracks, when not a part of railroad transportation facilities devoted or necessary to public use, is private property of the carrier and that the latter may lease it for private purposes to one or more persons and deny a like privilege to others. Donovan v. Pennsylvania Co., 199 U. S. 279, 26 S. Ct. 91, 50 L. Ed. 192; Andrews Bros. Co. v. Pennsylvania R. Co., 123 I. C. C. 733. . . ." *Ibid.*

Notwithstanding these authorities, petitioner argues (Br. p. 17) that the Union Pacific right of way was "granted only for purposes of construction" and cannot be used for any purpose other than railroad and telegraph operations. The critical defect in this argument is that it tries to rewrite the grant to Union Pacific as if it were a grant "of the right of way to the extent necessary for the operation of the railroad and telegraph lines and for no other purpose." If Congress had intended that the use of the right of way should be so limited, it would have said so. *Cf.* 23 Stat. 73; 26 Stat. 783. The absence of such a limitation in the 1862 Act shows that the right of way can be used for any purpose that does not interfere with railroad operations.

Petitioner's reliance on *Caldwell v. United States*, 250 U. S. 14, serves to point up the fallacy in its argument that the right of way can be used only for railroad purposes. The statutory provision involved in *Caldwell* authorized the railroad "to take, from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad." The grant was restricted by its terms to the single specified use—*i. e.*, that "necessary" for the construction of the railroad—and thus the Court properly held that the railroad was not entitled to the proceeds from sale of tree tops which were admittedly not used for construction of the railroad. *Cf. United States v. Denver and Rio Grande Ry. Co.*, 150 U. S. 1, 11. However, the grant in issue here is not limited to a single specified use and accordingly there is no basis for preventing the railroad from using portions of its right of way for purposes which do not interfere with railroad operations.

Likewise distinguishable is *Los Angeles & Salt Lake R. Co. v. United States*, 140 F. 2d 436 (9th Cir. 1944), cert. denied, 322 U. S. 757, which petitioner cites in support of its statement that a limited fee does not necessarily include a conveyance of minerals (Br. p. 34). That case involved a grant to the United States of certain property for the purposes of a free, public, navigable channel with a specific proviso for reverter if the property *"be used for any purposes other than specified herein."* 140 F. 2d at 436-437. The specific condition of reverter in the event of any other uses places that case in a special category of cases which are sharply distinguishable from the Union Pacific grant. In such cases, a specific use is declared to be exclusive and the grant by its terms prevents all other uses. This was the basis for the court's decision in the *Los Angeles & Salt Lake Railroad Co.*

case. Such cases are not in point here, for the right of way was granted to Union Pacific "to have and to hold the same so long as it was used for the railroad right of way." *Cf. Northern Pacific Ry. Co. v. Townsend*, 190 U. S. at 271. There is no provision, either expressed or implied, for a reversion in the event of other uses, so long as the designated use is continued.

The *Los Angeles & Salt Lake Railroad* case illustrates the vital distinction between (1) a defeasible fee in which a particular use is specifically declared to be exclusive and the grant, by its terms, prevents all other uses, and (2) a defeasible fee in which the purpose of the grant is specified but the grant does not prevent use for other purposes so long as the specified use is maintained. In the first case, the use for any purpose other than the specified purpose is generally held to terminate the grant, whereas in the second case the only event which can bring about a termination of the fee is the cessation of the specified use. The Union Pacific grant is of the second type—the sole event which could cause a reverter is the cessation of railroad operations. As we have shown pp. 29-34, *supra*, the authorities are uniform in holding that the owner of a limited fee of the second type has all the rights of an owner in fee simple so long as the estate continues.

Contrary to petitioner's suggestion (Br. p. 35), its position is not strengthened by the comment in the *Townsend* case that the right of way "was explicitly stated to be for a designated purpose . . ." 190 U. S. at 271. That observation was made in the context of the Court's holding that an adverse possessor could not be permitted to frustrate the congressional purpose in granting the right of way. But the fact that the grant was made to accomplish a "designated purpose" does not show that a

portion of the lands granted cannot be used by the grantee for another purpose which does not interfere with the designated purpose. Indeed, the Court in *Townsend* made it plain that there is no restriction on the railroad's use of the right of way so long as railroad operations continue:

> ". . . Congress . . . plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained . . ." 190 U. S. at 272.

In view of these authorities, it is clear that so long as Union Pacific continues to operate its railroad, it is entitled to develop and take the minerals in the lands comprising the right of way.

3. No Rule of Construction Prevents the Minerals From Passing to Union Pacific.

In support of its argument that Union Pacific has only a "surface use of the right of way" and cannot take the minerals, petitioner advances a strict construction argument, urging that with respect to federal grants, nothing passes but what is conveyed in clear and explicit language (Br. p. 11). From this petitioner asserts that the railroad must be able to point out language in the grant specifically conveying the minerals (Br. p. 12).

No canon of strict construction has ever been held to require, as petitioner would have it, that every right of the grantee and every item to be granted must be specifically spelled out in a grant or conveyance by the federal government. Such a rule would mean that the federal

government could not use words of art or technical terms of conveyancing which have come to have a precise meaning in centuries of practical use and judicial construction.

If Congress granted "title" to land without referring to minerals, the grantee certainly would not be precluded from ownership of the minerals by any rule of construction, even though there was no language in the grant expressly conveying them. Indeed, the Court has stated: "The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the States and Territories of the United States, and in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be, who owns the surface." *Del Monte Mining Co. v. Last Chance Mining Co.*, 171 U. S. 55, 60.

In that case the Court emphasized that "the possible fact of a separation between the ownership of that surface and the ownership of the mines beneath the surface, growing out of contract, in no manner abridged the general proposition that the owner of the surface owned all beneath." *Ibid.*

The proposition that minerals pass to a grantee of the Federal Government although they are not specifically mentioned in the grant is illustrated by the decisions of this Court in *United States v. Wyoming*, 331 U. S. 440 and 335 U. S. 895. In the earlier decision the Court held that the United States, not the state of Wyoming,

had title to certain school lands in Wyoming and referred to a Special Master the claim of the United States for damages arising out of oil operations on the property by the State's lessee, the Ohio Oil Company. After the first decision, Congress passed an Act directing the Secretary of the Interior "to issue a patent" to Wyoming for part of the land, with "title" thereto considered to have been vested in Wyoming on July 10, 1890. 62 Stat. 1233. In the subsequent decision, the Court held that the issuance of the patent obviated the necessity of considering the claim for damages "Inasmuch as the patent issued by the United States vests title to said land in the State of Wyoming during the entire period of possession by the defendant Ohio Oil Company . . ." 335 U. S. at 896.

Although the federal statute in the *Wyoming* litigation did not convey the minerals to Wyoming in explicit language, this Court had no difficulty in concluding that the "title" which passed to Wyoming included the minerals as well as the surface. Similarly, in the present case, no rule of construction prevents the Court from holding, in accordance with settled principles of the law, that the grant to Union Pacific of a "limited fee" in the right of way included the right to develop the minerals. It is sufficient that Congress, in its right of way grant to Union Pacific, used language conveying an estate which invariably has been held to include the minerals.

II.

The Federal Mineral Policy in 1862 and the History of the Union Pacific Act Show That the Right of Way Grant Included the Minerals.

In considering this section of the brief, it is important to differentiate between (1) an exception of mineral lands and (2) a reservation of mineral rights. An exception of mineral lands constitutes a complete exclusion from a land grant of all lands which contain minerals.* A reservation of mineral rights refers to the separation of the surface of the property from the underlying minerals, with the surface being granted and the mineral rights being withheld by the grantor.**

Petitioner places major emphasis on the argument that there was operative in 1862 a federal policy which requires the Court to hold that the mineral rights in the right of way were reserved and retained by the United States (Br. pp. 18-30). There is no express reservation of mineral rights from the Union Pacific grant, and petitioner does not so claim. And petitioner concedes that an

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*A typical exception of mineral lands is that contained in the Morrill Act, 12 Stat. 503 (1862): "That there be granted to the several States, for the purposes hereinafter mentioned, an amount of public land, to be apportioned to each State a quantity equal to thirty thousand acres for each senator and representative in Congress to which the States are respectively entitled by the apportionment under the census of eighteen hundred and sixty; *Provided*, That no mineral lands shall be selected or purchased under the provisions of this act."

**A typical reservation of mineral rights is that contained in the Stock-raising Homestead Act, 39 Stat. 862, 864 (1916): "That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same."

exception of mineral lands cannot be applied to the right of way (Br. pp. 26, 30n). Thus, petitioner's position is that a reservation of mineral rights in the right of way must be implied on the basis of a mineral policy which allegedly was operative in 1862 and was embodied in the grant.

The Court below, sitting in a circuit where there is a special familiarity with mineral rights problems, rejected this attempt to graft a reservation of mineral rights on to the right of way grant [R. 23-24]. The Court pointed out that petitioner's argument incorrectly "assumes that a policy of retention of the full title to mineral lands is the same as a policy of conveying the fee and reserving mineral rights" [R. 23]. Historical evidence amply supports the Court of Appeals: as we shall demonstrate, (a) the policy of separating the surface rights from the underlying mineral rights relied upon by petitioner was not adopted until half a century after the 1862 Act; (b) the mineral policy actually in effect in 1862 affirmatively supports the conclusion that Congress intended to grant the railroad the right to take and develop the minerals; and (c) an implied reservation of mineral rights is not in accord with the legislative history of the 1862 Act.

A. The Policy of Separating the Mineral Rights From the Surface in Disposing of Public Lands Was Not Established Until After 1900.

A brief examination of the development of the policy of reserving mineral rights will make it abundantly clear that the Court of Appeals was accurate in stating that:

> ". . . The policy of conveying the fee and reserving minerals to the United States was not fully

developed until the passage of the Stockraising Homestead Law in 1916, 43 U. S. C. A. 291, et seq., and the Leasing Act of 1920, 30 U. S. C. A. 181, et seq." [R. 23-24.]

Indeed, as we shall show, the practice in federal grants of separating surface from mineral rights and reserving the mineral rights to the United States did not find legislative expression until as late as 1909 and even then was regarded as a novel departure from long established policy.

Prior to 1900, both mineral and agricultural lands owned by the United States were available for patent in fee under separate groups of statutes. Mineral lands were readily available at nominal prices and without royalty under the Mining Act of July 26, 1866, 14 Stat. 251, the Placer Mining Act of July 9, 1870, 16 Stat. 217, and the Lode Mining Act of May 10, 1872, 17 Stat. 91.* Agricultural lands were freely available under a host of statutes, including the Land Sale Act of April 24, 1820, 3 Stat. 566, the Pre-emption Act of September 4, 1841, 5 Stat. 453, and the Original Homestead Act of May 20, 1862, 12 Stat. 392.

Following the turn of the century a wholly new viewpoint regarding the country's mineral resources began to develop. Public attention was drawn to abuses in connection with the patenting of land with mineral potential as agricultural land and to the overrapid occupancy of the concededly mineral portion of the public domain.

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*When in 1896 the Interior Department ruled that oil lands could not be located or patented under the placer mining laws because oil was not a "mineral" (*Union Oil Co.*, 23 L. D. 222), Congress promptly responded by specifically applying the placer mining laws to oil lands. 29 Stat. 526 (1897).

This induced Presidents Roosevelt and Taft to withdraw vast tracts from occupancy or patent under the land laws until determination was made by the Geological Survey as to their value for minerals, particularly coal and oil. *United States v. Midwest Oil Co.*, 236 U. S. 459, 466-468; Bulletin No. 537, U. S. Geological Survey, pp. 36-39. These withdrawals threatened to freeze such lands from any use for lengthy periods and to cause the eviction of many good faith occupants.

In response to the problems created by these withdrawals, Secretary of the Interior James R. Garfield proposed in his annual report to the President in 1907 that the government adopt a broad new policy of separating the surface from the underlying mineral rights in disposing of coal lands. Secretary Garfield said:

> "I can not urge too strongly the need of a change in the policy hitherto adopted by the Government for the disposition of the coal land . . . The experience in other sections of our country and abroad leads me to believe that the best possible method . . . is for the Government to retain the title to the coal, and to lease under proper regulations which will induce development when needed, prevent waste, and prevent monopoly. Such a method permits the separation of the surface from the coal and the unhampered use of the surface for purposes to which it may be adapted." Report of the Secretary of the Interior, p. 15 (1907).

President Theodore Roosevelt generalized this recommendation to cover all minerals:

> "Rights to the surface of the public land should be separated from rights to forests upon it and to

minerals beneath it, and these should be subject to separate disposal." Vol. 15, Messages and Papers of the Presidents, p. 7266 (Special Message to Congress, Jan. 22, 1909).

Acting on these recommendations, Congress passed the Act of March 3, 1909, 35 Stat. 844, which provided that good faith agricultural entrymen on public lands subsequently classified as being valuable for coal could obtain patents, with coal rights reserved to the United States.* The following colloquy in the House debate on the Act emphasizes that the statutory separation of minerals from the surface was a significant departure from prior policy.

"MR. STEPHENS [Congressman Stephens] of Texas. I desire to know the difference between this law which the gentleman proposes and the law as it now exists. What change is proposed, and why?

MR. MONDELL [Congressman Mondell of Wyoming, Chairman of the House Public Lands Committee]. . . . This bill simply provides that in any case where, subsequent to the location or the entry, the character of the land has been called into question the entryman may, if he so elect, accept a limited patent. It is the first legislation before Congress providing for a limited patent, or a patent reserving the mineral. . . .

MR. STEPHENS. Is it not a fact that valuable minerals are reserved now to the Government?

*This approach was presaged in a few earlier statutes of limited application, including 26 Stat. 502 (1890) (sale of certain public lands to cities for cemetery and park purposes); 26 Stat. 854 (1891) (establishment of court of private land claims to confirm Spanish and Mexican grants); and 34 Stat. 325 (1906) (sale of unallotted Coeur D' Alenes Indian lands).

> MR. MONDELL. No; that is not true. The patent having issued, the patent carries everything in the land with it . . . In other words, the patents issued by the Government of the United States heretofore have been patents in fee." 43 Cong. Rec. 2504 (1909).*

In 1910 Congress supplemented the 1909 statute by providing that surface patents could be granted under the agricultural land laws to future entrymen on lands already withdrawn, classified or known to be valuable for coal. Act of June 22, 1910, 36 Stat. 583. During the debate on this measure, Congressman Mondell referred to a special message to Congress of January 14, 1910, by President Taft on "Conservation of Natural Resources," in which the President stressed the importance of the new approach to the disposition of public lands:

> "The present statutes, except so far as they dispose of the precious metals and the purely agricultural lands, are not adapted to carry out the modern view of the best disposition of public lands to private ownership . . . It is now proposed to dispose of agricultural lands as such, and at the same time to reserve for other disposition the treasure of coal, oil, asphaltum, natural gas, and phosphate contained therein. This may be best accomplished by separating the right to mine from the title to the surface . . ." 45 Cong. Rec. 622, 6041 (1910).

Congressman (later Senate Majority Leader) Robinson, opposing the enactment of the bill, focused upon the

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*Congressman Bonynge, opposing the bill, called the separation approach a "new and untried policy." 43 Cong. Rec. 2506 (1909).

novelty of the concept of separating surface from minerals:

> ". . . under the law as it now exists, there is no segregation of the surface from the coal beneath the surface. Coal lands are enterable only under the coal-land laws. This question as it is presented to the committee in the pending bill is an important one and involves a more radical and far-reaching change in the existing public-land laws than many of the gentlemen in the committee might at first imagine from a casual inspection of the bill." 45 Cong. Rec. 6044.*

In 1912, the statutory policy with respect to coal was extended to oil lands in Utah. Act of August 24, 1912, 37 Stat. 496. Senator Smoot of Utah observed that except for the fact that it applied to oil, the statute was "virtually the same bill" as the 1910 coal act. 48 Cong. Rec. 1756 (1912).

In 1914, the Surface Patent Act made surface rights to withdrawn non-metallic mineral lands generally available. Act of July 17, 1914, 38 Stat. 509. And in 1916, the Stock-raising Homestead Act stipulated that the type of homestead to be created by the Act would entitle the entryman to a surface patent only, with all minerals reserved to the government. Act of December 29, 1916, 39 Stat. 862. The culmination of the development begun in 1909 came in 1920, when the comprehensive federal Mineral Leasing Act provided for exploration and development of the minerals reserved to the government under the 1909-1916 laws. Act of Feb. 25, 1920, 41 Stat. 437.

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*To the same effect, Congressman Morgan noted that ". . . this bill is a new departure in the method of disposing of our public domain." 45 Cong. Rec. 6050.

That these federal statutes signified a new federal policy is uniformly and authoritatively recognized. In *Anderson v. McKay*, 211 F. 2d 798, 803 (D. C. Cir. 1954), the Court commented that:

> ". . . . In 1914 Congress introduced a new concept into the treatment of lands reported to be valuable for certain specified minerals—phosphate, nitrate, potash, oil, gas, or asphaltic minerals. It provided that such land could be entered or purchased and then patented under the non-mineral land laws, but with a reservation to the Government of those minerals . . . ."

Similarly, Morrison and DeSoto, Oil and Gas Rights (1920), states that "The Act of July 17, 1914 . . . was perhaps the first serious attempt, not locally limited, to sever the surface title from the mineral title in disposing of the public domain" (p. 508). The development of the concept of reserving mineral rights in federal grants is also traced in Hibbard, A History of the Public Land Policies, pp. 523-527 (1939); 1911 Annual Report of the Director of U. S. Geological Survey, pp. 246-249; and Bulletin No. 537, U. S. Geological Survey, pp. 36-39, 45-46. Moreover, title insurance companies, in insuring titles under federal patents, regard the Coal Act of March 3, 1909, 35 Stat. 844, as initiating the federal policy of reserving mineral rights in the disposition of the public domain. Cox, Exceptions and Reservations in United States Patents to Public Lands, 35 Title News No. 3, pp. 9, 25 (March 1956); Ogden's California Real Property Law §5.11 (1956).

Petitioner recognizes that "it was in the Stock-raising Homestead Law of 1916, 43 U. S. C. 291, that Congress first provided for issuance of patents with a reservation of minerals" (Br. p. 29n). However, petitioner seeks to minimize the importance of this fact by claiming that it does not show the absence of a policy of reserving mineral rights in 1862 but merely evidences an intention to "eliminate the loophole" through which such a policy had been frustrated. *Ibid.* The historical synopsis set forth above fully refutes petitioner's unsupported claim. Congressional adoption, beginning in 1909, of the technique of separating the surface from the underlying minerals marked an entirely new departure in the disposition of the public domain.

The only authorities cited by petitioner in support of its mineral policy argument purport to show the existence of a policy of excepting mineral lands in 1862. This policy is said to be reflected in Section 3 of the Act which grants the "place lands" and provides that "all mineral lands shall be excepted from the operation of this act."* So far as the "place lands" are concerned, this express exception excludes all mineral lands from the grant. But petitioner admits that this express exception and the alleged policy of excepting mineral lands cannot be applied to the right of way for the obvious reason that such an

*See pp. 58-60 for explanation of the reason why the word "act" was used.

exception "might have made it impossible to construct the road, because few if any, routes were possible which wholly avoided mineral lands" (Br. p. 26). And, again, that "lands which happened to contain minerals could not be totally excepted from the right of way which had to follow a reasonably straight line (Br. p. 30n.).*

Since mineral lands cannot actually be excepted from the right of way, petitioner is forced to argue that the "minerals policy could be and was effectuated, not by excepting the total surface area, but rather by withholding the minerals in the land constituting the right of way" (Br. p. 30n). In other words, petitioner asks the Court to distort an alleged policy of *excepting mineral lands* into the entirely different policy of *reserving mineral rights*, and then to read this transformed policy into the grant of the right of way. Petitioner attempts to justify this distortion by dismissing as "technical" the difference between a policy of excepting mineral lands from public land grants, and a policy of conveying only the surface while reserving the mineral rights (Br. p. 8). But the difference is vastly more than technical. As we have shown, a reservation of mineral rights brings into play a completely different principle—namely, a separation of the property into two estates—and when Congress in

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*This admission is made necessary not only by the physical facts, but also by Section 8 of the Act which directed that the railroad to the Pacific be constructed "upon the most direct, central, and practicable route." The right of way had to be continuous and hence could not jump over or go around any mineral lands that might happen to be in the way.

1909 began to employ this technique, it recognized that it was inaugurating a new policy.

To summarize, it is clear that since the federal policy of reserving mineral rights did not commence until after 1900, there is no basis for petitioner's argument that Congress intended to make such a reservation from the right of way granted to Union Pacific in 1862. In urging that a reservation of mineral rights in the 1862 right of way grant be implied, petitioner is asking the Court to do something which Congress in 1862 certainly would not have done.* A consideration of the federal mineral policy actually operative in 1862, to which we now turn, fully supports this conclusion.

B. The Federal Mineral Policy Operative in 1862 Confirms the Conclusion That Union Pacific Has a Right to Develop the Minerals Within Its Right of Way.

We have already shown that the policy of conveying the surface and reserving mineral rights is of twentieth century origin. We now turn to the period of the Union Pacific grant to determine not only what federal mineral policy in fact existed but the reasons underlying it.

The objective of the federal government in 1862 and, indeed, throughout the nineteenth century was to pro-

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*Even today it is highly doubtful that an implied reservation of mineral rights must be read into every land grant subsequent to 1909 in which the statute is silent with regard to minerals. *United States v. Price*, 111 F. 2d 206 (10th Cir. 1940); Cox, Exceptions and Reservations in United States Patents to Public Lands, 35 Title News No. 3, pp. 23-25 (March 1956).

mote and encourage the exploration and development of mineral resources by private citizens as rapidly as possible. To accomplish this, Congress ordered disposition of mineral lands at nominal prices and without reserving royalty. See *Union Oil Company v. Smith*, 249 U. S. 337, 349; *Mining Company v. Consolidated Mining Company*, 102 U. S. 167, 173.*

From the time of the discovery of gold in California in 1848 until the passage of the Mining Act of July 26, 1866, 14 Stat. 251, Congress "assented to the general occupation of the public lands for mining." *See Atchison v. Peterson*, 87 U. S. 507, 512; *Del Monte Mining Company v. Last Chance Mining Company*, 171 U. S. 55, 62; *Chambers v. Harrington*, 111 U. S. 350, 352. The 1866 Mining Act, which was the first general statute for the disposal of mineral lands, recognized and confirmed the "possessory rights" of miners who had discovered minerals in the public domain. The Act declared unequivocally "that the mineral lands of the public domain . . . are hereby declared to be free and open to exploration and occupation by all citizens of the United States." It further provided for the issuance of patents to mineral lands at nominal prices. From that date until the withdrawals of the early 1900's, mineral lands could be filed upon and patented as readily as agricultural lands. In

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*At first Congress sought to accomplish this by providing that the President might lease lands containing salines and lead, but this practice was abandoned at an early date in favor of disposing of these lands outright to states and private parties. Compare Act of March 3, 1807, 2 Stat. 445, 446 (authorizing leases of lead mines and salt springs), with Act of March 3, 1829, 4 Stat. 364 (providing for sale of lead mines in Missouri), and Act of March 1, 1847, 9 Stat. 146 (providing for sale of lands containing copper, lead and other valuable ores in Michigan).

fact, as late as 1897 Congress provided for the disposition of oil lands in fee under the placer mining laws (see p. 43, *supra*).

If, from the viewpoint of the mid-twentieth century, such a policy of encouraging development of the mineral and agricultural resources of the public domain seems over-generous, it must be borne in mind that the Nineteenth century was the century of the frontier. Minerals were deemed essential to national economic growth, and the mineral resources of the frontier, extending in 1862 from the Mississippi River to the Pacific Ocean, seemed inexhaustible.

It was to facilitate the development of these mineral resources that Congress gradually adopted the policy of segregating the mineral lands from the agricultural lands. Far from seeking to retain the minerals for the federal government, the exception of mineral lands in the grants of "place lands" to railroads was for the purpose of keeping such lands open for rapid mineral development rather than having them occupied for agricultural uses. See *Atchison v. Peterson*, 87 U. S. at 512; *Barden v. Northern Pacific R. Co.*, 154 U. S. 288.

In light of this history it seems clear that petitioner's argument that minerals in the right of way were to be locked up and reserved for the United States is completely at variance with the very policy of mineral development which the government was enthusiastically fostering in 1862, a policy which was reflected in the exception of mineral lands from the grant of "place lands." Since Union Pacific is entitled to exclusive use and possession, its right of way could not have been thrown open to mineral development as were the excepted lands. Thus, the

best way—indeed, in the perspective of 1862, the only way—to insure the development of mineral resources within the right of way was to grant a limited fee, including the minerals, to the railroad.

The historical evidence outlined above led the Court of Appeals to hold that "the governmental policy in effect at the time of the Union Pacific grant, was that a grant or conveyance by the United States carried with it the full title, including minerals" [R. 23]. To support its conclusion, the Court of Appeals properly relied on *Barden v. Northern Pacific R. Co.*, 154 U. S. 288, and *Burke v. Southern Pacific R. Co.*, 234 U. S. 669 [R. 23]. In *Barden* the Court held that the exception of mineral lands from the grant of "place lands" in the 1864 Northern Pacific Act applied to lands not known to be mineral at the time of the enacting statute but found to be mineral prior to the issuance of a patent and the passage of title. However, in *Burke* the Court held that if a patent had issued to the railroad for the alternate sections, complete title, including all minerals subsequently discovered, passed to the railroad notwithstanding the statutory exception of mineral lands.*

The basic principle established by the *Barden* and *Burke* cases is that under these railroad grants, *once title has passed to the railroad*, the Government loses all claim to

*The present vitality of the principle established by the *Burke* case is shown by the fact that it was the basis of the recent decision in *Thomas v. Union Pacific R. Co.*, 139 F. Supp. 588, 591-592 (D. Colo. 1956), aff'd, ... F. 2d ..... (10th Cir., Dec. 24, 1956).

the minerals. This rule applies irrespective of whether there is a patent. The decision in *Shaw v. Kellogg*, 170 U. S. 312, 341, 343, makes it clear that "There is no magic in the word 'patent,'" and that where Congress makes no provision for a patent, none is essential. The decisive factor is whether title has passed, and "in whatsoever manner that is accomplished, the same result follows as though a formal patent was issued." *Ibid.* It is definitely settled that title to the right of way passed to the railroad at least "upon the construction of the road" if not earlier. *M. K. & T. Ry. Co. v. Roberts*, 152 U. S. 114, 116; *Stuart v. Union Pacific R. R. Co.*, 227 U. S. 342, 352. The Union Pacific Railroad was actually constructed, as required by the act of Congress, more than 85 years ago [R. 12].

On a parity of reasoning to the *Barden*, *Burke* and *Kellogg* cases, it follows that when title to the right of way passed to the railroad, there could be no reservation of the minerals in the Government. These cases make it clear that there is no public policy or rule of construction which requires that a reservation of minerals be implied, and indicate that the right to the minerals passed to Union Pacific when construction of the railroad was completed.

Petitioner seeks to distinguish the *Burke* case on the ground that that decision is "based upon considerations peculiar to the objectives of the 'place land' grant" (Br. pp. 27-30). However, analogous considerations with respect to optimum land use, considered in the light of the 1862 policy of encouraging mineral development, support Union Pacific's right to take the minerals within the

right of way. Since Union Pacific was entitled to exclusive use and possession of its right of way, the most efficacious way for Congress in 1862 to insure the early development of the mineral resources within the right of way was to grant a limited fee, including the minerals, to the railroad. And that is what Congress did.

C. An Implied Reservation of Mineral Rights Is Not in Accord With the Legislative History of the 1862 Act.

The segment of legislative history of the 1862 Act primarily relied upon by petitioner (Br. pp. 24-25) is, when fully understood, decisively against petitioner's position that a reservation of mineral rights should be implied in the right of way grant. Representative Cradlebaugh became concerned, as petitioner says (Br. p. 24), about the possibility that "place lands" in the alternate sections adjacent to the right of way, thought to be nonmineral when patented to the company, would turn out to be valuable mineral lands. Accordingly, he proposed an amendment to Section 4 to provide that "all minerals in the lands conveyed" be reserved and that the public be permitted to prospect for them. Congressional Globe, 37th Cong. 2d Sess., Pt. 2, p. 1909.

It is evident that Mr. Cradlebaugh's proposed amendment concerned only the "place lands." Section 4, which he proposed to amend, authorized the issuance of patents to the "place lands" progressively, as each 40 miles of road was completed. That section had nothing to do with the right of way. Moreover, in speaking for his amendment, Mr. Cradlebaugh urged that "these lands, after they shall have been conveyed to the railroad company, shall remain open, to be prospected upon by the public, and if they shall be found to be mineral lands they

shall be thrown open to the public . . . ." *Id.* at p. 1910. It is clear that these comments could relate only to the "place lands," because of the nature and use of the right of way, the fact that it could not be thrown open to the public, and the further fact that it was conveyed to the company by the Act itself and not by subsequent patents.

In replying to Mr. Cradlebaugh, Representative Sargent stated (as petitioner points out) that "The mineral lands through which this road is to pass are already excepted in this bill from the lands to be granted to this company." Petitioner asserts that "no distinction was made . . . between 'place' mineral lands and minerals under the right of way" in Mr. Sargent's statement (Br. p. 25). However, since Mr. Sargent was opposing an amendment which related only to the "place lands," it seems obvious that his assurance concerned the same subject matter. Moreover, in his reply to Mr. Cradlebaugh, Mr. Sargent specifically referred to an exception of "mineral lands," and he made no reference to a reservation of mineral rights.

But there is a more important aspect in this exchange between Mr. Cradlebaugh and Mr. Sargent. What Mr. Cradlebaugh proposed, as we have seen, was a reservation of mineral rights from the grant in fee of the "place lands." Mr. Sargent, who opposed the amendment, made the following comment:

> "This bill proposes for the mineral lands affected by it the same policy that the Government has always pursued, and whenever a change is to be made in that policy I want to be heard upon it more at length than I can be in a five minutes' speech." Congressional Globe, 37th Cong., 2d Sess., Pt. 2, p. 1910.

The existing policy to which Mr. Sargent referred was the policy of excepting mineral lands from the grant of "place lands." The proposal which he rejected as involving a change in the policy of the Government was the proposal to reserve mineral rights in lands actually granted. The House joined him in voting down the proposed amendment. This is the strongest kind of contemporaneous evidence that there was no federal policy of reserving minerals rights from granted lands at the time of the Union Pacific grant.

The legislative history of the exception of mineral lands in Section 3 of the Act is cited by petitioner as "additional evidence" in support of its position (Br. p. 26). Petitioner points out that the exception in Section 3, as it passed the House, read "provided, that all mineral lands shall be exempted from the operation of this section" but that the word "act" was substituted for the word "section" by the Senate. Petitioner recognizes that to apply the exception to the right of way "might have made it impossible to construct the road, because few, if any, routes were possible which wholly avoided mineral lands" (Br. p. 26). However, petitioner attempts to find in this amendment substituting the word "act" for the word "section" an inference of Congressional intention to bar the railroad from obtaining the mineral rights in its right of way. As we shall show, no such inference can be drawn.

A review of the provisions of the Act furnishes a ready explanation for the substitution of the word "act" for the word "section" in the Section 3 exception of mineral lands. In Sections 9, 13 and 14 of the Act, there are provisions authorizing the construction of other railroads

"upon the same terms and conditions, in all respects" as the Union Pacific grant. The "terms," of course, include a grant of "place lands" in aid of construction of those railroads. Thus, in addition to the grant to Union Pacific in Section 3, there were grants of "place lands" to other railroads pursuant to Sections 9, 13 and 14 of the Act. None of these sections contained exceptions of mineral lands. To insure that the mineral land exception in Section 3 would be applicable to the "place land" grants in Sections 9, 13 and 14, it was natural for Congress to change the word "section" to "act" in Section 3 rather than repeating the exception in each of the three sections. Thus, it is clear that Congress, in making this change, did not intend to make the exception of mineral lands applicable to the right of way or to reserve the minerals underlying the right of way.

This Court has recognized that while the grant of "place lands" in aid of construction is subject to several exceptions (*i.e.*, for lands to which homestead or preemption claims have attached, reserved lands and mineral lands), none of these exceptions applies to the right of way grant. In *Railroad Co. v. Baldwin* the court pointed out that in contrast to the grant of "place lands"

> ". . . the grant of the right of way . . . contains no reservations or exceptions. It is . . . subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed." 103 U. S. at 429-430.

Referring to the exceptions in the grant of "place lands", the Court further declared that,

> ". . . Had a similar qualification upon the absolute grant of the right of way been intended, it

can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists." 103 U. S. at 430.

The fact that there are no exceptions or reservations from the right of way grant is also forcefully indicated in *Stuart v. Union Pacific R. R. Co.*, 227 U. S. 342, 353, where the Court stated:

> "In this connection it is to be remembered that the grant of the right of way differed from the grant of alternate odd-numbered sections in that, while both were expressed in the words of a grant *in praesenti*, the former was without limitation or exception, while the latter was expressly made subject to the limitation or exception that it should not include any lands which, although public at the date of the grant, were sold, reserved or otherwise disposed of by the United States, or to which a preemption or homestead claim had attached, at the date of definite location."

D. Neither the Administrative Nor Legislative Construction of the 1862 Act Supports Petitioner's Claim.

Petitioner attempts to support its position by referring to the administrative construction of the Act (Br. pp. 48-52). Although petitioner relies on the *Great Northern* case to establish the relevance of prior administrative construction, petitioner fails to mention that it was *"contemporaneous* administrative interpretation" which the Court in *Great Northern* said is pertinent. 315 U. S. at 275. The earliest administrative interpretation relating to minerals within the right of way was in 1905—a full 43 years after the grant to Union Pacific and certainly far from being "contemporaneous." Moreover,

this far-removed administrative interpretation is directly contrary to the established rules concerning the incidents of a limited fee, as outlined above.

Furthermore, these administrative rulings are self-serving, having been made in effect by one of the two parties to the controversy. Judge Learned Hand has pointed out that a public officer whose duty it is to take the Government's side is charged with a very different duty from that of a court called upon to decide a dispute. *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F. 2d 785, 789 (2d Cir. 1946), aff'd, 328 U. S. 275. "If there is a fair doubt, his duty is to present the case for the side which he represents . . ." *Ibid.* Rulings of the public officer under such circumstances "need not have the detachment of a judicial, or semi-judicial decision and may properly carry a bias." *Ibid.* However, this bias must be taken into account in any judicial determination of the questions involved.*

Petitioner argues that the administrative construction has been endorsed by Congress in the Act of May 21, 1930, 46 Stat. 373, which authorizes the federal government to lease portions of rights of way (Br. p. 51). In the *Great Northern* case, the Court of Appeals, which held

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*"It is pertinent in this connection to point out that Union Pacific Railroad Company, long before the question of ownership of subsurface minerals arose, construed its right of way grant as a grant in fee which included all minerals, and acted upon that construction. This long usage is reflected in the trial court's unchallenged finding:

> "It has long been the practice of the defendant when entering into leases of portions of its right of way to reserve the right to retake possession for mineral operations." [R. 13.]

for the United States, made the following comment with respect to this Act:

> "This statute is little more than a self-serving declaration, as it was enacted at a time when the ownership of the underlying oil had become a subject of controversy." 119 F. 2d at 827.

While it is proper to consider subsequent legislation in the interpretation of prior legislation, this does not prevent a court from concluding that a particular subsequent statute can be largely discounted because of the circumstances of its passage. This is the case with the Act of 1930, both because it is 68 years removed from the 1862 grant and because it is "self-serving."

If the 1930 statute has any relevance at all, it is clearly outweighed by the Act of June 24, 1912, 37 Stat. 138, and the Act of April 28, 1904, 33 Stat. 538. Those statutes validated certain conveyances in fee of part of their rights of way which had been previously made by Union Pacific and Northern Pacific. There was no reservation of minerals in these validating acts. Yet if Congress believed that the United States owned the minerals under the right of way, it seems likely that Congress would have reserved them in validating conveyances in fee by the railroads. In view of the dates of these Acts, they come closer to being contemporaneous constructions by Congress of the 1862 grant than the more recent statute cited by petitioner.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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